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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN BENJAMIN CLOPTON, JR.
Petitioner,

v.

CITY OF DALLAS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether in employment discrimination cases where a rejected applicant proves that the person selected, was selected because of his race, the employer need only articulate a legitimate non-discriminatory reason for the rejection under the McDonnell Douglas Corp., v. Green standard, or whether the employer must meet the Mt. Healthy City School District v. Doyle "same decision" standard.

PARTIES

John Benjamin Clopton, Jr., is the Petitioner here and the individual party plaintiff below.

The Respondent is the City of Dallas, a municipality.

Jurisdiction of the district court was premised on 28 U.S.C. §§ 1343(4), 2201 & 2202 (1976 & Supp. III 1979) and 42 U.S.C. § 2000e-5(f) (1976).

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

John Benjamin Clopton, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment and findings of fact and conclusions of law by the District Judge

were not reported. See Appendix at A. The opinion of the United States Court of Appeals for the Fifth Circuit was not reported. See Appendix at B.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 5, 1985. See Appendix at B. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Equal Protection clause of Amendment XIV of the United States Constitution.

STATEMENT

Petitioner John Benjamin Clopton, Jr., (hereinafter "Clopton") is a white citizen of the United States and resident of the State of Texas. Clopton was hired by Respondent, the City of Dallas (hereinafter "the City"), Texas on August 26, 1970 as a Building Inspector II in the Department of

Housing and Urban Rehabilitation (department). In the Fall of 1973, the City passed a new Sign Ordinance which lead to the creation of several new positions within the department. In October, 1973 the City Civil Service Board (Board) announced promotional examinations for an unspecified number of Zoning Inspector Supervisors 13 ("ZIS - 13") positions and one Chief Zoning Inspector - 15 position ("CZI - 15").

Clopton took and passed the promotional examination for ZIS - 13 and was certified as an eligible applicant for promotion on the Board's Register of Eligibles. Clopton was ranked number 13 of 15 certified applicants. The Board also issued a Register of Eligibles for the CZI - 15 position with five applicants listed. According to Board regulations, the register was to remain in effect until a new register was certified by the Board. The CZI - 15 register was

returned to the Board by the department without action as to any of the certified candidates. The department did not give reasons why all of the five candidates were rejected. The return of the register to the Board without action by the department was considered a cancellation of the register. All certified applicants on both registers were white.

The department empaneled a screening committee who selected four applicants from the ZIS - 13 register, including one who ranked lower than Clopton. The committee summarily rejected Clopton without interview. At the time of his rejection, Clopton, in addition to being a certified applicant, met all the announced qualifications for the ZIS - 13 position in terms of relevant education, technical background and job experience, and had an

excellent work record with the City. Clopton was not officially notified of his rejection or reasons therefore, until September 9, 1974, after he specifically requested such written notice. Clopton was not offered any further opportunities to qualify.

The Department recruited a black person, Noble Jones (Jones) and unofficially placed him into a ZIS - 13 position on November 21, 1973, the same date that the 4 white applicants were placed into the ZIS - 13 positions. Jones had not applied for either position, nor had he taken either qualification examination, nor did he meet the announced job qualifications for either position. At the time of this selection Jones had an extremely poor work record with the City. In December, 1973 Jones took a qualifying examination for the ZIS - 13 position on a non-competitive basis, and

failed. Jones, however, remained in the ZIS - 13 position. On April 1, 1974, Jones again took the qualifying examination for the ZIS - 13 position on a non-competitive basis, this time allegedly passing the examination. On April 24, 1974, Jones was officially promoted to a non-budgeted ZIS - 13 position. On August 28, 1975, Jones was placed into an officially budgeted ZIS - 13 position, without competitive action.

As of the time of the City's action with respect to Jones, the City did not have a bona fide affirmative action plan in effect nor did the City have any history of discrimination against blacks in supervisory positions. The City did have an announced equal employment opportunity plan which provided that each department head's annual compensation review would be dependant upon his EEO record.

Clopton filed this action on July 19, 1983, after waiting 8 years for his Notice of Right to Sue from the Equal Employment Opportunity Commission (EEOC). The EEOC investigator testified that he recommended a cause finding based upon record evidence that the City had afforded Jones preferential treatment based upon his race. 1/ Clopton alleged that the City failed to promote him to ZIS - 13 because of his race, white. Clopton alleged that a lesser qualified black person was promoted by the City pursuant to an informal affirmative action plan. 2/

1/ EEOC's stated explanation for the 8 year delay is that the investigative file slipped down behind a file cabinet where it stayed for 6 years. It appears that this case has slipped through the cracks in more ways than one.

Because of the Investigator's "cause" recommendation, this case was transferred to the EEOC Office of OPI, since there was no Commission precedent on the affirmative action issue as of 1975. In 1983, the case was dismissed due to untimely filing.

At trial Clopton proved via direct admissions of various City officials that Jones had been selected because of the City's efforts to recruit and place blacks into supervisory positions. This direct evidence consisted of Plaintiff's Exhibit No. 28, which was identified as a letter submitted to the Equal Employment Opportunity Commission by Respondent on May 10, 1975, wherein the following statement was made:

> - - - In that no qualified minority appeared on the register a search was initiated to find one or more qualified minorities.

The following statement was also made:

> A new division of Zoning Inspection was being held inaugurated in the Department of Housing and Urban Rehabiliation. Thus several positions were open.
>
> Five positions were filled in this Division on Nov. 21, 1973. Those appointed:

* * *

2/ Clopton argues that because Jones was an unqualified non-applicant, with an extremely poor employment record with the City, race was the sole determinative reason for his selection.

Noble Jones, black male, transferred from the Department of Consumer Affairs for training as a Zoning Inspector Supervisor but without promotion.

Plaintiff's Exhibit 28, p. 1 & 3

Plaintiff's Exhibit No. 9, identified as letter from the Department to Clopton, dated September 9, 1974, also contained the following direct admissions:

As you are aware, the interviews for both the zoning supervisor 13 and 15 positions were done by a committee, the composition of which varied somewhat. After the interviews were completed, it was the opinion of all of those who participated in the interview committee that there remained reservations regarding the potential of the interviewed candidates to satisfactorily fill the 15 position.

During the discussion of this matter, Mr. Noble Jones' name was suggested by his former supervisor as someone who might well possess this potential. He was therefore, invited to be interviewed, and on basis of the interivew committee opinion, offered one of the inspector 13 positions, subject, of course, to fulfilling the various requirements.

At trial, J. T. Jones, the Building Official, the highest level department

official who testified, testified that Richard Wilson, the Director of the Department had informed him that he (Wilson) had selected and promoted Noble Jones for affirmative action reasons. The second highest department official who testified, Jerry Batts, testified that Richard Wilson had selected and promoted Noble Jones without consulting any member of the selection committee. Batts testified that the committee had nothing to do with the selection or promotion of Noble Jones. Noble Jones himself testified that he was not interviewed by any committee.

In presenting the case at the district court level, Clopton argued that because he could prove that the City acted pursuant to a race conscious purpose, in selecting a black person, the City had the burden of proving that it would have rejected Clopton even in the absence of the racial preference

afforded Jones, by a preponderance of the evidence, contrary to the McDonnell Douglas Corp v. Green, 411 U.S. 752 (1973) standard of mere articulation of a legitimate non-discriminatory reason for Clopton's rejection.

Trial was held on October 1 and 2, 1984. The District Court filed its Opinion on December 20, 1984, ruling in favor of the City of Dallas. The Court found that one of the reasons that the City selected Noble Jones is his race. The District Court however, further held:

> To say that Mr. Jones' race was a factor in his promotion is not to say that Plaintiff's race was a factor in the refusal to promote him.

In response to Clopton's argument concerning the applicable burden of proof, the district court stated:

> As a full trial has been had, the various formulations of burden of proof proposed by the parties must fall away. As the Supreme Court

noted in United States Postal Service v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983). The only question left after consideration of all the evidence is whether or not plaintiff has been discriminated against.

The district court proceeded to evaluate the case pursuant to the McDonnell Douglas Corp. v. Green, burden of proof and allocation of proof standards. The district court did not specifically address petitioner's argument concerning the direct evidence standard.

Final Judgment in favor of the City was entered on January 29, 1985. Petitioner filed his timely Notice of Appeal on February 19, 1985.

In his appeal to the Fifth Circuit, Petitioner argued that the district court erred in applying McDonnell Douglas Corp. v. Green, proof standards where plaintiff established a prima facie case by direct evidence of a discriminatory purpose or intent. Clopton argued that because of the

direct evidence of intent to discriminate on the basis of race, the City, in order to discharge its rebuttal burden, had to prove by a preponderance of the evidence, that Clopton would have been rejected even in the absence of the preferential treatment afforded Noble Jones.

The Fifth Circuit filed it Opinion on September 5, 1985. Addressing Petitioner's burden of proof argument, the Court stated:

> The appellant's argument that different burdens of proof and persuasion should be invoked depending on the type of evidence presented, i. e., direct or circumstantial, is not valid. The Supreme Court in Aikens stated, "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." 103 S.Ct. at 1481 n. 3. In Aikens, the Court showed no inclination to divide burdens of proof and persuasion into direct or indirect evidentiary categories. See Id. See also Williams, 718 F.2d at 717 (stating that the trial court's duty is to simply decide the ultimate factual issue in a case and that this can be done either directly or indirectly).

REASONS FOR GRANTING THE WRIT

I. The Holdi[illegible]f The Fifth Circuit That the McDonnell Douglas Corp. Standards Apply Where a Prima Facie Case is Proved by Direct Evidence of a Discriminatory Purpose Is In Conflict With The Decisions of This Court In Bakke, Mt. Healthy City School District, Trans World Airlines, Inc., and With Decisions of Other Courts of Appeals.

Employment decisions by public employers made solely on the basis of race are prohibited by the Equal Protection Clause of the Fourteenth Amendment and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e and decisions of this court. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albermale Paper Co. v. Moody, 422 U.S. 405, 412 (1975); Univ. of Calif. Regents v. Bakke, 438 U.S. 265 (1978). Title VII protects whites as well as blacks from racial discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

Where the evidence shows, as it does here, that an employment decision, is the result of a race conscious purpose or objective, either through direct admissions or by the facial make-up of a special program, a higher standard of review attaches particularly where a public employer is involved. Bakke at 289-290. In Bakke this court was not directly confronted with the but/for question, as to whether but/for the special admissions program, Bakke would have been admitted to medical school, because the University conceded that it could not have met the burden of proving that Bakke would not have been admitted even in the absence of the special program. In addressing this issue however, this court cited Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) as setting forth the applicable burden of proof standards in a case where

exercise of a constitutionally protected right had proximately caused the discharge in the but-for sense. Id. 320 n. 54. There the Supreme Court reversed and remanded with instructions that the City School Board be given an opportunity to prove that Doyle would have been discharged even in the absence of his exercise of First Amendment rights. The burden of proof on the "same decision" test was clearly on the City Education Board.

The Eleventh Circuit has clearly and consistently followed the Mt. Healthy standards where direct evidence of intent to discriminate on the basis of, inter alia, race, has been proved by an employee in his case in chief. In fact, this court refused to grant certiorari in an early Eleventh Circuit case styled Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied 104 S. Ct. 2385 (1983).

Most of the Eleventh Circuit cases reported are post U.S. Postal Service v. Aikens, 460 U.S. 711 (1983), cases. 3/

The Fifth Circuit on the other hand, has rejected the Eleventh Circuit's construction of Aikens, and has held, as it did here, that Aikens does not recognize a distinction between a prima facie case based upon direct evidence of intent to discriminate and one based upon circumstancial evidence of discrimination.

3/ The Eleventh Circuit cases are Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983); Smith v. State of Georgia, 749 F.2d 683 (11th Cir. 1985); Miles v. M. N. C. Corp., 750 F.2d 867 (11th Circuit 1985); Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985); Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1498 11th Cir. 1985); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799 (11th Cir. 1985).

A review of decisions of this court in affirmative action preferential treatment cases reveals that the proponent of preferential treatment based upon race bears the burden of proving its legality. See United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Memphis Fire Dept. v. Stotts, 104 S.Ct. 2576 (1984).

Clopton argues that this case should not be governed by the McDonnell Douglas v. Corp. v. Green / Texas Dept. of Comm. Affairs v. Burdine 450 U.S. 428 (1981), proof standards because he put forth direct evidence of race conscious discrimination by the City. This Court itself in Trans World Airlines, Inc., v. Thurston __U.S.___, 105 S. Ct. 613 (1985) held that the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. Id. 622. 4/

Similarly the Eleventh Circuit in Lewis v. William French Smith et al., 731 F.2d 1535, 1537 (11th Cir. 1984), stated:

> The McDonnell Douglas method of proving discrimination is appropriate when discriminatory motive must be inferred from circumstantial evidence. However, if the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. 5/

In Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), the Eleventh Circuit stated:

> It should be clear that the McDonnell Douglas method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. It would be illogical indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a Defendant to meet that direct proof by merely articulating, but not proving, legitimate, non-discriminatory reasons for its actions. Emphasis added.
>
> * * * * * * *
>
> Following these principles, this court has held that where a case of discrimination is proved by direct evidence, it is incorrect to rely on a McDonnell Douglas rebuttal. Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982). If the evidence consists of direct testimony that the defendant

4/ Trans World Airlines was a case brought pursuant to the Age Discrimination In Employment Act of 1967.

> acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically:
>
> Once an [illegal] motive is proved to have been significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.
> Id. (citing Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L.Ed. 2d 471) (emphasis added); accord Perryman v. Johnson Products Co., 698 F.2d 1138, 1143, (11th Cir. 1983); see Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980).

715 F.2d 1556-7.

The proper burden of proof allocation in the present case is clearly outcome determinative. The trial court ruled against Clopton because it found that he was rejected before the City recruited the

black person, even where the preponderance of the evidence shows that the City, in recruiting an admittedly nonqualified black, passed over 16 qualified and certified white applicants. 6/ Moreover, the City afforded the black employee several opportunities to

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5/ A review of this court's post McDonnell Douglas Corp. v. Green cases clearly reveals that this court intended McDonnell Douglas to apply only where a Title VII plaintiff relied on circumstantial evidence of discrimination. The first explanation came in Teamsters v. United States, 431 U.S. 324, 358, n. 44, (1976), where this court recognized that no direct evidence of discrimination was required. This court stated that elimination of the two most common legitimate reasons (lack of qualification or absence of vacancy) "is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." The following year in Furnco Construction Corp. v. Waters,438 U.S. 567, 577 (1977) this court added "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." (citing Teamsters) And we are willing to presume this largely because we know from experience that more often then not people do not act in a totally arbitrary manner, without any underlying reasons...."

qualify for the position on a non competitive basis. The trial court however, sided with the City on the basis of discredited testimony concerning Clopton's allegedly "argumentative" and "inflexible" disposition. The preponderance of the credible evidence, however, shows that Clopton enjoyed an outstanding work record with the City, his performance evaluations are complimentative of his cooperation and attitude, and there is no mention of any problem. 7/ Indeed, Clopton proved that the department director, had withdrawn these reasons himself, substituting the reason

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6/ This is not a case where a comparatively qualified black was promoted as was the case in Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981). This case is similar to Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520 (7th Cir. 1981) where racial considerations were found to be the sole determinative factor.

The fact that other non-complaining whites were also passed over does not defeat Clopton's claim. See Connecticut v. Teal, 102 S. Ct. 2525 (1982).

that Clopton "had less supervisory experience." Clopton proved that he possessed more supervisory experience than Jones.

II. The Fifth Circuit's Decision Raises Important and Recurring Questions Concerning the Appropriate Burden of Proof In Employment Discrimination Cases that Urgently Need Resolution by This Court.

A review of the many decisions of the different Federal Circuits reveals a wide disparity in the manner in which the issue presented here is being treated. Aside from the direct conflict between the Fifth Circuit and the Eleventh Circuit, there appears to be considerable confusion between the circuits as to the proper allocation of the burden of proof and persuasion in a

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7/ Indeed, under the Burdine test, any articulation by the City, even a false one, was sufficient to meet its burden. Clopton attempted to show the pretextuality of this reason by offering his entire personnel file into evidence. These records show that Clopton had never been cited for any such problem, and on the contrary, they showed a highly successful performance record. This was the only thing that Clopton could have done, as this Court itself recognized in Aikens, at footnote 2.

direct evidence case, which has lead to considerable disparity in results.

For example, the Fifth Circuit in Jacks v. Texaco Research Center, 743 F.2d 1129 (5th Cir. 1984), applied the Mt. Healthy "same decision" test in reverse, under the guise of applying Aikens. Thus, the Fifth Circuit imposed upon a Title VII plaintiff the burden of proving (1) a retaliatory motivation, and (2) that she would not have been fired but/for retaliation. In comparison, the Eighth Circuit in Bibbs v. Block 749 F.2d 508 (8th Cir. 1984) held that once a Title VII plaintiff proved that race was a discernible factor in the employer's decision, the ultimate issue of discrimination was proved, and there was nothing further for plaintiff to do to establish liability. The court noted that plaintiff had done more than proved a prima facie case. Other Courts have drawn distinctions

between a strong prima facie case and a weak one, in determining what the rebuttal burden is on an employer.

A review of reported cases in other circuits shows that the Second Circuit, 8/ Third Circuit, 9/ Sixth Circuit, 10/ and Tenth Circuit 11/ recognize the direct evidence standard, in lieu of the McDonnell Douglas test, in direct evidence cases. As stated supra, the Eighth Circuit imposes liability under Title VII once race is shown to be a "discernible factor." 12/

8/ Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2nd Cir. 1983).
9/ Lewis v. Univ. of Pittsburgh, 725 F.2d 910 (3rd Cir. 1983).
10/ EEOC v. Maxwell Co., 726 F.2d 282 (6th Cir. 1982). There is language in Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370 (6th Cir. 1984), which reflects that the Sixth Circuit recognizes the intended application of McDonnell Douglas, which is consistent with the Eleventh Circuit's view.
11/ Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983); EEOC v. Wyoming, 771 F.2d 1425 (10th Cir. 1985).

The First, Fourth, Ninth and D.C. Circuits have approved of the shifting of the burden of proof and persuasion to the employer, but only at the remedial stage after liability has been established. 13/ The Fourth Circuit, Fifth Circuit and Eleventh Circuit, approve of shifting the burden of proof to defendant where plaintiff proves that the employer has a history of discrimination. 14/

12/ Bibb v. Block, 749 F.2d 508 (8th Cir. 1984). The Eighth Circuit also appears to recognize the direct evidence standard consistent with the Eleventh Circuit. See Clay v. Hyatt Regency Hotel, 724 F.2d 721 (8th Cir. 1984).

13/ NRLB v. Wright Line, 662 F.2d 899 (1st Cir. 1981); Patterson v. Greenwood School Dist. No. 50, 696 F.2d 293 (4th Cir. 1982). (The Fourth Circuit also approved of the shifting burden in the liability stage, in Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982); Muntin v. State of Calif. Parks & Recreation Dept., 738 F.2d 1054 (9th Cir. 1984); Toney v. Block, 705 F.2d 1364, 1370 (D. C. Cir. 1983).

CONCLUSION

The progress made in the past several decades toward the integration of the workforce makes it an inescapable conclusion that race has been and will continue to be a factor in millions of employment related decisions made each year. Indeed racial considerations will be at the fore front as the last frontiers of the work force are integrated, consequently, the need to clarify the burden of proof standards applicable where an employer makes an admitted race conscious employment related decision, will be even greater. For these reasons, the Petitioner requests that this Court grant its Petition for a Writ of Certiorari.

14/ Evans v. Harnett County Bd. of Education, 684 F.2d 304 (4th Cir. 1982); Lee v. Conecuh County Bd. of Education, 634 F.2d 959 (5th Cir. 1981); Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982). This would appear to be direct evidence of discrimination.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-83-1253-C

JOHN BENJAMIN CLOPTON, JR.

v.

CITY OF DALLAS

OPINION

Plaintiff, a white male, has complained that the Defendant has violated his rights set forth by Congress in the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000 e.

As a full trial has been had, the various formulations of burdens of proof proposed by the Parties must fall away. As the Supreme Court noted in United States Postal Service v. Aikens, ___U. S.__, 103 S. Ct. 1478 (1983), the only question left after consideration of all the evidence

is whether or not plaintiff has been discriminated against.

I.

In October, 1973, Plaintiff was a Building Inspector 11 in Defendant's Department of Housing and Urban Rehabilitation. He saw a notice advertising the creation of four Zoning Inspector Supervisor 13 positions that would be filled by the Department. These new positions, which were a step above Plaintiff's position, came about because Defendant's City Council had just enacted a new Sign Code Ordinance.

Plaintiff applied to be placed on the register of individuals to be certified as qualified for the Zoning Inspector Supervisor 13 positions. As he met the preliminary criteria such as schooling and job experience, he was allowed to take the qualifying examination. On October 31, 1973, his name was placed thirteenth (out of

fifteenth) on the register with a final score of 72 (70 being passing).

On November 21, 1973, four other eligibles, including one lower on the list, were promoted to fill the four advertised positions. These four were also white males.

Unbeknownst to Plaintiff, at that time, the Defendant filled another Zoning Inspector Supervisor 13 position. This position was filled by a black male, Noble Jones, who was transferred from Defendant's Department of Consumer Affairs. Some time after this, it became apparent that Mr. Jones was fulfilling the duties of a Zoning Inspector 13. So Plaintiff made inquiries as to why Mr. Jones was hired for that position. This resulted in a lengthy proceeding in which the hiring of Mr. Jones and the denial of the promotion of Plaintiff were upheld by the Defendant's officials.

On March 10, 1975, Plaintiff timely filed his charge with the Equal Employment Opportunity Commission which dismissed his charge for want of jurisdiction on April 19, 1983. Plaintiff then filed his complaint in this Civil Action on July 17, 1983, within the limits of the law. Defendant has protested the eight-year delay by the E.E.O.C. This issue was adequately addressed when this Court denied Defendant's Motion to Dismiss so it will not be addressed here.

Mr. Jones' transfer and promotion were done in a rather odd manner. Apparently, Defendant's Department of Housing and Urban Rehabilitation was authorized to have only four Zoning Inspector Supervisor 13 positions, but needed five. It was, also apparently, not unusual for a department of Defendant that needed a different shuffle of personnel than was authorized by the City Council to "underfill" or "plug" another

vacant position temporarily with a person who would then fulfil the duties of the other needed position. This was within the letter of Defendant's Civil Service Regulations, but not necessarily the spirit.

"Underfilling" or "plugging" is the process for filling a vacant position when either or both Defendant's appointing official has rejected all of the certified eligibles on the list or those listed have refused an appointment.

Mr. Jones underfilled the position of Chief Zoning Inspector 15 on November 21, 1973, but performed the duties of a Zoning Inspector 13. On August 28, 1975, Mr. Jones finally was given a permanent Zoning Inspector 13 position when another employee retired.

II.

The employees of Defendant who were promoted to the four advertised Zoning Ins-

pector 13 positions were essentially hired by an interview committee. This committee had various members, all white males, who interviewed some of the 15 listed certified eligibles but not others. Plaintiff was one of those not interviewed. He was preceived by the committee members to not be supervisory material.

Plaintiff was considered to not be supervisory material because he had a reputation for being argumentative, inflexible and for doing things purely "by the book" when perfectly acceptable alternatives were available and preferred by a builder, architect or engineer.

When it became apparent to the members of the interview committee that the list of eligibles would be exhausted without all five positions being filled, a discussion ensued as to other possible persons who could be recruited for the fifth position.

Mr. Jones' name was put forward. He was subsequently interviewed and then "plugged" into the Chief Zoning Inspector Supervisor 15 position. It appears that one of the reasons that Mr. Jones was chosen to interview is his race, black.

III.

To say that Mr. Jones' race was a factor in his promotion is not to say that Plaintiff's race was a factor in the refusal to promote him.

Plaintiff has made no showing that the reasons put forth for his being refused the promotion were pretextual. The question is not whether the members of the interview committee were wrong in their perception of Plaintiff's likelihood of success as a supervisor. The question is purely whether or not he was discriminated against because of his race. The Court found the

Defendant's witnesses to be credible in stating why Plaintiff was not interviewed or promoted. Plaintiff presented no evidence that would intend to show that his reputation was any different than as stated by Defendant's witnesses. Also, it appears from Plaintiff's Exhibit #6 and #7 that three other applicants on the list of eligibles were refused promotion on the same grounds.

Plaintiff has made much ado about the relative qualifications of Mr. Jones and himself. These contentions need not be addressed as the decision to not promote Plaintiff occurred before the search for other candidates was initiated.

Plaintiff might have had a better case if he were a member of some sort of group that has been traditionally discriminated against or that Defendant has had some sort

of a history of discrimination against white males. The only showing that has been made is that one white male was turned down for promotion by a committee of white males who perceived him unfitted for the higher position. The Federal Courts must be careful to not allow what would be at most a state law unlawful employment practice case to be maintained as a suit under the Civil Rights Act of 1964. Therefore, Judgment will be awarded to the Defendant.

SIGNED

UNITED STATES DISTRICT COURT

Date

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-1038

Summary Calendar

JOHN BENJAMIN CLOPTON, JR.

v.

CITY OF DALLAS

Appeal from the United States District Court for the Northern District of Texas

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(September 5, 1985)

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.*

GARWOOD, Circuit Judge:

The plaintiff in this action brought

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., appeals from the district court's judgment following a bench trial, dismissing his suit and holding that he was not subjected to an unlawful employment practice. Determining that the judgment is supported by the district court's factual findings, and that these are not clearly erroneous, we affirm.

FACTS AND PROCEEDINGS BELOW

John Benjamin Clopton, Jr., appellant, a white former employee of appellee City of Dallas, was employed by the City as a Building Inspector, Civil Service Grade 11. The City expanded its zoning inspection division by adding at least four new Zoning Inspector Grade 13 positions.1/ Appellant took and passed the applicable Civil Service examination for one of these positions, although he placed thirteenth out of the fifteen applicants. Appellant was invited to interview with a hiring committee and

he did so, as did the other applicants. The hiring committee rejected appellant for one of the new positions on, the district court found, nonracial grounds. Four white males were appointed to the newly created positions, one of whom scored even lower than appellant on the Civil Service examination.

After these four positions were filled, a new position was created into which Noble Jones, a black City employee, was promoted. Appellant claims Jones was promoted solely

1/ Appellant and the City disagree as to how many positions were created. The appellant claims that five grade 13 positions were created and that the filling of the fifth and last position was on the basis of racial discrimination. The City claims that the last position was created only after all other applicants for the original four positions were disposed of through either a promotion into a new job or outright rejection. The City also claims that this last position was a grade 15 position, not grade 13 position. Because of the district court's findings, resolution of this dispute is not central to this appeal.

on the basis of race. The district court found that the decision not to promote appellant was made before the creation of the job for which Jones was eventually hired, that appellant was rejected on nonracial grounds, and that the search of new candidates to fill the last job was based upon the lack of qualified candidates.

Appellant contends these findings are erroneous. He contends that five grade 13 positions were created and that Jones was hired for, and appellant was thereby denied, one of these positions solely because of his race. Appellant contends that the decision to hire Jones was made before, not after, the hiring committee decided to reject appellant. Lastly, appellant complains of the district court's determination and implementation of the burden of proof and

persuasion. We reject these contentions.

DISCUSSION

1. Title VII Burden of Proof and Production

The basic allocation of burdens of proof and production in a Title VII case alleging discrimination is settled:

> "Initially the plaintiff must establish a prima facie case of discrimination, thus creating a rebuttable presumption that Title VII has been violated. The defendant must then counter the plaintiff's prima facie case by producing evidence that the defendant's action was not motivated by discriminatory intent. Finally, the plaintiff may then attack the defendant's rebuttal as pretextual." Williams v. Southwestern Bell Telephone Co., 718 F.2d 715, 717 (5th Cir. 1983) (citing McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817, 1825 (1983).

Despite the apparent shifting of the burden of proof in the second step in the above analysis, the plaintiff retains the "ultimate burden of persuading the trier of fact that the defendant intentionally discri-

minated against the plaintiff." Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981). After the plaintiff introduces evidence establishing a prima facie case, the burden on the defendant is one of production not persuasion. Id. at 1096.

The McDonnell Douglas-Burdine method was never intended to be mechanical or ritualistic, but simply an orderly way to examine relevant evidence. U.S. Postal Service Bd. of Governor's v. Aikens, 103 S.Ct. 1478, 1482 (1983). As the Supreme Court stated in Aikens, "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Id. at 1482. Here the defendant's evidence met that standard, and the district court had all

the relevant evidence it needed to decide the case. The Supreme Court explains that "the district court must decide which party's explanation of the employer's motivation it believes." Id.

This Court has examined the McDonnell Douglas and Burdine opinions, in conjunction with the more recent Aikens decision, and has held that the three-fold prima facie analysis is not proper for the evaluation of a case that has been fully tried on the merits. See Williams, 718 F.2d at 717. Indeed, the Williams Court held that it is entirely appropriate for the McDonnell Douglas-Burdine presumption to "'drop[] from the case'" when a trial court denies a defendant's motion to dismiss at the end of the plaintiff's case. Id. (citing Aikens, 103 S.Ct. at 1482). See also Hackett v. Housing Authority of City of San Antonio,

750 F.2d 1308, 1313 (5th Cir. 1985) ("In reviewing fully-tried discrimination cases, we focus on determining the viability of the district court's ultimate conclusion regarding the presence or absence of discrimination."); Lyford v. Schilling, 750 F.2d 1341, 1344 (5th Cir. 1985) ("Plaintiff misundertands the nature of review given a Title VII case that has been fully tried on the merits . . . [for] [t]he three-step analysis of prima facie case, rebuttal, and showing of pretext defined . . . is not the proper method of evaluating such a case." (Citations omitted.)).

The appellant's argument that different burdens of proof and persuasion should be invoked depending on the type of evidence presented, i.e., direct or circumstantial, is not valid. The Supreme Court in Aikens stated, "As in any lawsuit, the plaintiff

may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." 103 S.Ct. at 1481 n. 3. In Aikens, the Court showed no inclination to divide burdens of proof and persuasion into direct or indirect evidentiary categories. See Id. See also Williams, 718 F.2d at 717 (stating that the trial court's duty is to simply decide the ultimate factual issue in a case and that this can be done either directly or indirectly).

11. Review of Factual Findings

The scope of our review of the district court's findings of fact is limited to determining whether such findings are clearly erroneous. See Pullman-Standard v. Swint, 102 S.Ct. 1781, 1788-89 (1982). The Pullman Standard, decision held the clearly erro-

neous standard of Fed.R.Civ.P. 52 (a) applicable to findings of fact even if those facts constituted the ultimate issue in the case. Id. at 1789. A ruling is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 68 S.Ct. 525, 542 (1948).

We thus reject appellant's invitation to conduct an independent review because the district court's findings respecting discrimination are findings of "ultimate facts." Bose Corp. v. Consumer's Union of U.S., Inc., 104 S.Ct. 1949 (1984) (Rule 52 (a) applies to facts even if they determine the outcome of ligitation); Williams, 718 F.2d at 718.

The findings by the district court in

this case are not clearly erroneous. Specifically, the findings that appellant was rejected from consideration for the position before Noble Jones was considered is not clearly erroneous. The record shows persuasive evidence that a hiring committee composed of all white males who were personally familiar with the appellant's employment record rejected the appellant on his merits. For example, Jerry Batts, a committee member, testified at trial that appellant was inflexible and created problems by enforcing the code too rigidly. Two other witnesses who worked closely with the appellant testified at trial and substantiated Batts' testimony. Sam Harting, assistant building official for the City, testified that appellant could not accept "equivalence," a concept which permits discretion by the enforcement official in

interpreting the code. Ray Couch, a workmate of the appellant, testified that appellant was argumentative, opinionated and uncompromising. Appellant did not show that these unflattering opinions were based on race. Appellant placed thirteenth out of fifteen on the test, yet another white who placed even lower than appellant was hired in preference to him.

The record also contains other evidence that supports the district court's findings. For instance, appellant himself testified that he was rejected for a similar position in 1973 for reasons nearly synonymous with the ones stated by the witnesses above. In a separate incident, there was testimony that after the appellant received a promotion, he had to return to his former position after two months because he could not perform as a supervisor.

With the above evidence introduced at the trial, we hold that the district court's findings were not clearly erroneous. The district court's credibility choices are due our special deference under Rule 52 (a).

The above finding makes a determination of the other alleged factual errors unnecessary, for this would involve comparisons between the candidates, and the district court essence found that appellant would have been rejected in all events. Because appellant was rejected on his own merits, the reason for his not being promoted are nonracial. 2/ Consequently, appellant was rejected on nonracial grounds.

For the reasons stated above, the decision of the district court is affirmed.

AFFIRMED.

2/ As the district court noted, this makes a discussion of how many positions were open, at what time, and at what level moot because appellant would not have in any case received a promotion.

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 85-1038

JOHN BENJAMIN CLOPTON, JR.

Plaintiff-Appellant,

CITY OF DALLAS

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

[x] The motion of appellant _____
for [] stay [x] recall and stay of
the issuance of the mandate pending
petition for writ of certiorari is
DENIED.

[] The motion of _____
for [] stay [] recall and stay of
the issuance of the mandate pending
petition for writ of certiorari is
GRANTED to and including _____,
the stay to continue in force until
the final deposition of the case by
the Supreme Court, provided that
within the period above mentioned
there shall be filed with the Clerk
of this Court the certificate of the
Clerk of the Supreme Court that the

certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[] The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

[] The motion of _____ for a further stay of the issuance of the mandate is DENIED.

SIGNED

_____
UNITED STATES CIRCUIT JUDGE

42 U.S.C. Section 2000e provides:

"It shall be an unlawful employment practice for an employer

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Fourteenth Amendment provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-956

JOHN BENJAMIN CLOPTON, JR.,
Petitioner,

v.

CITY OF DALLAS,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITY ATTORNEY OF
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16 pp

QUESTION PRESENTED

Did the district court and the court of appeals properly apply the rule established by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), that after a Title VII case has been fully tried on the merits, the district court must decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-956

JOHN BENJAMIN CLOPTON, JR.,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the Northern District of Texas is set out in Plaintiff's Petition for Writ of Certiorari, Appendix A. The opinion of the Court of Appeals for the Fifth Circuit is set forth in Plaintiff's Petition for Writ of Certiorari, Appendix B.

RELEVANT STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a):

"It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Petitioner John Benjamin Clopton, Jr. (Clopton), a white former employee of Respondent City of Dallas, Texas (City), brought suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., claiming that the City did not promote him to the position of zoning inspector supervisor 13 because of his race. The district court concluded that Clopton was not subjected to an unlawful employment practice in violation of 42 U.S.C. §2000e, et seq., and the Court of Appeals for the Fifth Circuit affirmed the district court's decision on September 5, 1985.

STATEMENT OF FACTS

Clopton originally was employed by the City as a building inspector, civil service grade 11 (R. 36). The City expanded its zoning inspection division by adding four new zoning inspector supervisor 13 positions and one new chief zoning supervisor 15 position (R. 216). Each new position was to be filled by an applicant who successfully completed a competitive civil service examination and interview process (R. 38, 216). Clopton formally applied for the zoning inspector supervisor 13 position and passed the requisite civil service examination (R. 38). He did not, however, apply for the chief zoning supervisor 15 position and did not attempt to take the examination for that position (R. 93).

Applicants who passed the zoning inspector 13 examination were invited to interviews conducted by an ad hoc committee specially appointed for that purpose (R. 216-217, 219). The members of that committee were personally acquainted with Clopton and were familiar with his qualifications; therefore, they did not interview Clopton (R. 218-219).

The evidence which Clopton offered at trial to support his claim of discrimination included his testimony that his experience qualified him for the position of zoning inspector supervisor 13 (R. 35-53, 66-77), and that the City transferred a black employee, Noble Jones, to fill a chief zoning supervisor 15 position in accordance with the City's equal employment opportunity goals (R. 54-62). The City introduced evidence at trial that Clopton was rejected because he was unqualified and not because he is white (R. 48-49, 217-219, 225, 227-230, 243, 248). The City also offered evidence that the transfer of Jones was unrelated to Clopton's rejection for a different position (R. 164-173, 220), and was based upon Jones' qualifications rather than his race (R. 110-112, 130-136, 140-143, 157-161, 230-231, 236-238, 244).

SUMMARY OF ARGUMENT

The district court and court of appeals properly applied the rule established by this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), by focusing upon the ultimate factual issue of the presence or absence of discrimination after the full trial on the merits in this case. Clopton has failed to demonstrate any departure from the consistent application of *Aikens* by all federal courts of appeals; therefore, the writ of certiorari should be denied.

ARGUMENT AND AUTHORITIES

THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE RULE ESTABLISHED BY THIS COURT IN *UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS*, 460 U.S. 711 (1983), THAT AFTER A TITLE VII CASE HAS BEEN FULLY TRIED ON THE MERITS, THE DISTRICT COURT MUST DECIDE THE ULTIMATE FACTUAL ISSUE OF WHETHER THE DEFENDANT INTENTIONALLY DISCRIMINATED AGAINST THE PLAINTIFF.

Prior to this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), lower court opinions indicated confusion regarding the evidentiary evaluation of Title VII cases. *Aikens* instructed lower courts that their technical evidentiary analysis of the case should not obscure the fundamental factual inquiry of whether the defendant intentionally discriminated against the plaintiff. *Aikens*, 460 U.S. at 715, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Aikens, in clarifying the proper district and appellate court review of Title VII cases, held that, as in any case, a Title VII plaintiff may prove his case by direct or circumstantial evidence. *Aikens*, 460 U.S. at 714 n.3. *Aikens* further held that after the defendant has offered a nondiscriminatory basis for plaintiff's rejection, the burden of persuasion remains upon plaintiff to prove either that a discriminatory motive more likely motivated the defendant or that the defendant's reason for rejection is in reality merely a pretext for discrimination. *Aikens*, 460 U.S. at 716, citing *Burdine*, 450 U.S. at 256. The ultimate factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253. After the defendant has articulated a nondiscriminatory reason for rejecting the plaintiff, the question of whether the plaintiff properly made out a prima facie case is no longer relevant. *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253. After the case is fully tried on the merits, the district court must decide which party's explanation of the employer's motivation is the more credible. *Aikens*, 460 U.S. at 716. The *Aikens* analysis has been followed without exception in every circuit. *See Moore v. Devine*, 767 F.2d 1541, 1547 (11th Cir. 1985); *Poolaw v. City of Anadarko, Oklahoma*, 738 F.2d 364, 367 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 784 (1985); *Casillas v. United States Navy*, 735 F.2d 338, 343 (9th Cir. 1984); *Bell v. Bolger*, 708 F.2d 1312, 1318 (8th Cir. 1983); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985); *Fields v. Bolger*, 723 F.2d 1216, 1219 (6th Cir. 1984); *Williams v. Southwestern Bell Telephone Co.*, 718 F.2d 715, 717 (5th Cir. 1983); *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356, 360 (4th Cir. 1983) *cert. denied*, 105 S.Ct. 1841 (1985); *Dillon v. Coles*, 746 F.2d 998, 1002 (3rd Cir. 1984); *Sweeney v. Research*

Foundation of State University of New York, 711 F.2d 1179, 1184 (2nd Cir. 1983); *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 70 (1st Cir.), *cert. denied*, 105 S.Ct. 433 (1984); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 823 (D.C. Cir. 1984).

The district court in the instant case properly evaluated the evidence presented at trial by focusing upon the issue of discrimination vel non. During the trial on the merits, and following Clopton's presentation of his case-in-chief, Jerry Batts, a member of the ad hoc hiring committee, testified that Clopton was not interviewed for the position because he was considered by the committee to be unsuitable for a supervisory position (R. 219). Batts testified that Clopton was inflexible and created unnecessary problems due to his excessively rigid enforcement of the Building Code (R. 218-219, 225). Batts further testified that Clopton had no experience as a supervisor and that he lacked the quality of judgment needed to equitably administer and enforce the new sign ordinance (R. 218-219, 225). Batts stressed that an applicant's interpretative skills and flexibility were essential to the successful introduction and enforcement of the new sign ordinance (R. 217-219), and that he would not have selected Clopton for this sensitive position had there existed three times as many openings (R. 219).

Sam Harting, an assistant building official for the City, testified that Clopton had difficulty accepting "equivalence," which permits code enforcement officials discretion in their interpretation of the codes (R. 227-230), and that Clopton often refused to accept the building official's interpretation of the Building Code without written instructions (R. 227-230). It was Harting's belief that these problems clearly evidenced Clopton's inflexibility in the area of code enforcement (R. 229-230).

Ray Couch, who worked closely with Clopton in the City's building inspection division, testified that Clopton was argumentative, excessively opinionated and uncompromising, distrusting of management, and incapable of working within the system as a "team player" (R. 243, 248).

The district court found the testimony of Batts, Harting and Couch to be credible and convincing.

Clopton thereafter offered no evidence that the opinions of Batts, Harting and Couch regarding Clopton's unsuitability as a supervisor were based upon his race. Rather, Clopton admitted that the reasons given by the City's witnesses at trial for his not being selected to the position were identical to those given him by Harting in 1973. Those reasons included Clopton's inflexibility, his stereotypical attitudes, his problems in field enforcement, and his insufficient field enforcement and supervisory experience (R. 48-49). Clopton himself offered evidence that he was "too inflexible for code enforcement" (Defendant's Exhibit 5, admitted on Plaintiff's motion). This evidence, along with the uncontradicted testimony of Batts, Harting and Couch, clearly showed that Clopton lacked the job qualifications described in Plaintiff's Exhibit 4(a), entitled "Specification Classification."

Additionally, Clopton failed to offer any evidence to corroborate his self-serving statements that he was qualified for zoning inspector supervisor 13. The documentary evidence which Clopton offered did not support his contention that he was qualified as a supervisor, and never, during his eight-and-one-half year tenure with the City, did he serve in that capacity.

Nor did Clopton offer evidence of racial motivation. On the contrary, Clopton admitted that he had no such evidence from the City management (R. 94). Clopton admitted that his conclusion of race as a factor in the promotion decision was based upon gossip, hearsay, rumor, "office scuttlebutt," and a 1971 memorandum (Plaintiff's Exhibit 23), the last of which he did not connect either to those making the employment decisions in this case or to the decisions they made (R. 94-95). Clopton also admitted at trial that the interview committee rejected him and instead selected four white males who were appointed to fill the vacant zoning inspector supervisor 13 positions he sought (R. 217-218).

Clopton's allegation of racial discrimination apparently is based upon the transfer of Noble Jones, a black City employee, to fill the chief zoning supervisor 15 position (R. 168-173). Jones' background before 1973 and his work experience thereafter indicate his superior supervisory talents. Jones testified that he worked his way up through the Ben E. Keith Company, from warehouse helper to warehouse supervisor to salesman (R. 133-134, 157). Jones also worked for the Jackson Brewing Company as manager of Public Relations in a three-state territory (R. 135-136, 157-158). Immediately before working for the City, Jones worked for Great Commonwealth Life Insurance Company where he became district manager with full personnel responsibilities in his East Texas district (R. 136-138, 158-159). Jones' experience with the City before 1973 included code enforcement in the department of urban rehabilitation and in the weights and measures division of the department of consumer affairs (R. 140-143, 159-161, 236-238). Jones at the time of trial was sector manager for the City's department of housing and urban rehabilitation (R. 161).

James Blackwood, Jones' supervisor in 1973, testified that Jones learned the technical weights and measures code quickly, and applied common sense to the law (R. 238). Blackwood also testified that Jones had an exceptional ability to deal with the public (R. 238).

Couch testified that Jones was an outstanding supervisor (R. 244), and Harting testified that Jones had good interpersonal skills, as well as a flexible and innovative approach to code enforcement (R. 230-231). These opinions of Jones' work performance were consistent with the testimony of William Underhill, manager of employee relations for the City, that Jones was transferred because of his supervisory qualifications and not because he was black (R. 110-112).

Jones' transfer to fill a chief zoning supervisor 15 position was accomplished at a different time and by a different hiring authority than that which rejected Clopton (R. 164-173, 220). Clopton offered no evidence that connected his rejection to Jones' transfer.

Based upon the foregoing evidence, and the failure of Clopton to introduce evidence substantiating his claims, the trial court properly focused upon the fundamental issue of discrimination. The court's conclusion that Clopton failed to prove by a preponderance of the evidence that the City intentionally discriminated against him was in conformity with the analysis and the review standards set forth in *Aikens* and *Burdine*.

Clopton now proposes that because his prima facie case was established by direct evidence of discrimination, the City must prove by a preponderance of the evidence that nondiscriminatory reasons existed for his rejection. This proposition was expressly rejected by the Supreme Court in *Burdine*, 450 U.S. at 256.

The authorities relied upon by Clopton are all cases in which a plaintiff succeeded in persuading the court that the defendant acted with a discriminatory motive. Where a Title VII plaintiff carries the burden imposed by *Burdine* and proves that an illegal animus has played a role in the employer's decision, the burden shifts to the defendant to prove that the adverse action would have been taken for permissible reasons even absent discrimination, thereby precluding the plaintiff from relief. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357 (1977); *Patterson v. Greenwood School District No. 50*, 696 F.2d 293, 295 (4th Cir. 1982); *Milton v. Weinberger*, 696 F.2d 94, 96 (D.C. Cir. 1982); *Mims v. Wilson*, 514 F.2d 106, 110 (5th Cir. 1975). *See also Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (unconstitutional motive). *See generally* B. SCHEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 36, at 154-155 (Supp. 1983); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO.L.REV. 17, 30 n. 40 (1984). This issue is not present, however, in the instant case because Clopton failed to meet the fundamental burden of persuading the trial court that discrimination played any role in his rejection for promotion to zoning inspector supervisor 13. *See, e.g., Smith v. State of Georgia*, 749 F.2d 683, 687 (11th Cir. 1985). The authorities cited by Clopton, therefore, are inapplicable in this case.

The district court and the court of appeals followed settled precedent in this case by focusing upon the ultimate factual inquiry of the presence or absence of discrimination after trial on the merits. Clopton has failed to demonstrate any departure from the consistent application of *Aikens* by all federal courts of appeals; therefore, the writ of certiorari should be denied.

CONCLUSION

For the above reasons, Respondent City of Dallas, Texas, respectfully prays that this Court deny the writ of certiorari.

Respectfully submitted,

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No. 85-956

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN BENJAMIN CLOPTON, JR.
Petitioner,

V.

CITY OF DALLAS
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

SUMMARY OF REPLY ARGUMENT

The City argues that the district court and the court of appeals properly applied the rule established by this court in United States Postal Service Board of Governors, v. Aikens, 460 U.S. 711 (1983) because Clopton failed to present direct evidence that the City acted with a discriminatory motivation in rejecting him for promotion to zoning inspector supervisor 13. Such a contention is without merit. Clopton did present such evidence.

II.

LOWER COURT ERROR

Clopton submits that the district court and the court of appeals ignored the direct evidence of discrimination presented by Clopton. The City does also.

The district court did find that race was a factor in the selection of Jones. The district court found, however, that Clopton suffered no discrimination because Jones was not selected until after Clopton's rejection. The evidence showed that the City deprived Clopton of the same promotional opportunities as it afforded Noble Jones, not before Clopton was rejected by the committee, but after, during the period from November 21, 1973 through April 24, 1974. 1/ During this period Jones was given the benefit of on the job training and several opportunities to qualify for promotion. Clopton, on the other hand, was summarily rejected, and

1/ During this period, the City took a black, unqualified, marginal, non-applicant employee; made him a qualified applicant and promoted him on a non-competitive basis, all without an affirmative action plan or history of discrimination against blacks. (CR 290; R 112-113).

not given any further opportunity to qualify and be reconsidered for the April 24, 1974 vacancy, because this position was filled in secret.

The evidence as summarized by the City in its brief shows only that Clopton was rejected by the screening committee in connection with the filling of the five positions on November 21, 1973.

Clopton, proved that the certificate of eligibles he was placed on as a result of his successful October, 1973 qualifying examination, continued in effect for one year. (R 204, 213). He remained an eligible candidate for promotion.

Clopton also proved that Richard Wilson, and not the committee, selected Noble Jones for the ZIS-13 position on April 24, 1974.

III.

DIRECT EVIDENCE

The direct evidence of discrimination presented by Clopton is as follows:

Evidence that the Department set-out to recruit minorities, because none were on the certificate of eligiblity. See page 8 of Petitioner's Opening Brief. 2/

The following direct testimony of J. Thomas Jones, Jr., the City official responsible for overall hiring within the Department in 1973:

> Q. Mr. Jones, I want to call your attention back to the year 1973-1974 and ask you what title you had at that time. Where were you employed at that time?

2/ The fact that no minorities were certified by the Board would be of no significance unless the department was seeking minorities. This alone reflects racial preference. To say that the City sought to recruit minorities, yet when it promoted Jones, race was not a factor, defies reason.

A. I was employed by the City of Dallas as the manager administrator of the building inspection division.

Q. Who did you report to?

A. At that time?

Q. 1973-1974, yes.

A. I believe it was Mr. Richard Wilson.

Q. What title did he have?

A. He was the director of the department.

Q. The Department of Housing and Urban Rehabilitation?

A. Yes.

Q. Now, calling your attention back to the Noble Jones situation, what is your recollection of when Mr. Jones came into the department - - into the zoning division?

* * *

A. The best I can recall there is that Mr. Wilson promoted him to the job.

Q. From what department?

A. Well, he's in the same department if I recall. It was just in another division.

Q. Do you know why Mr. Jones promoted him to that position I'm sorry. Mr. Wilson.

A. I'm under the impression that it was during that time that we had the beginning phases of an affirmative action program.

Q. And that's why he did it?

A. Yes Sir. (R 101-103).

The following testimony was given by one of the City's key witnesses:

Q. What is your name?

A. Jerry Batts.

Q. In what position were you in 1973?

A. Technical and Research Co-ordinator.

Q. And so you are saying then that you plugged Mr. Noble Jones into that position?

A. No, sir, Mr. Dick Wilson did that by himself without consulting any member of the committee to my knowledge. 3/

Q. Do you know anything about Mr. Jones' qualifications?

> A. Mr. Jones was a 12 in the - in another department. Mr. Wilson moved him over to plug 15. Subsequently, Mr. Jones took the 13 test and passed it. (R 221-222).

Following his placement in the CZI-15 position on November 21, 1973, Jones was allowed to take the ZIS-13 position qualification examination on a noncompetitive basis, on two occasions until he passed the examination. (R 147-148). Clopton was not afforded this same opportunity.

The City argues that Jones possessed superior qualifications. The City fails to note the following:

Clopton met the stated qualifications for the ZIS-13 position on April on April 24, 1974. (PX 4; PX 2; R 37-45). Jones did not. Jones admitted that prior to April 1, 1970, he had no work exper-

ience with building construction codes (R 140); no prior experience enforcing the zoning code (R 150); no prior experience enforcing the sign code (R 151); no prior experience reviewing construction plans and specifications (R 150-151). These were all stated requirements. (PX 4).

Jones' educational background was in Music. Clopton's was in Civil Engineering. (R 4). Jones' employment history was in beer sales for ten years and life insurance sales for three years. (R 134, 136). Clopton's was in construction. The only supervisory experience possessed by Jones was supervising insurance agents for one year. (R 134,138). Clopton had been a construction crew foreman and had trained

3/ Richard (Dick) Wilson did not testify. Mr. Batts was a member of the committee. (R 216-217). See also testimony of the EEOC Investigator (R 14-15).

new zoning inspectors in the department for several years. (R 44-45).

As of April 24, 1974, Clopton had an outstanding job performance record with the City. (PX 8). Jones did not. Jones admitted that in 1972 he was suspended for 5 days for violation of City work rules. (R 162). Jones admitted that in 1972 he had received an unsatisfactory performance evaluation criticized for conducting personal business on City time. (R 155-56). 4/

The claim tried by Clopton as framed in the Pre-Trial Order entered by the district court is that he was denied a promotion to ZIS-13 because of his race on either November 21, 1973 or April 24, 1974. (CR 27).

To argue, as the City apparently does, that Clopton was properly denied the

April 24, 1974 position because he had been previously rejected by the screening committee, proves discrimination as a matter of law when the circumstances under which Jones was awarded the position are taken into consideration.

IV.

CONCLUSION

In light of the direct evidence that discrimination on the basis of race did play a direct role in Clopton's rejection for the April 24, 1974 vacancy, it was encumbent upon the City to prove by a preponderance of the evidence that Clopton would have been rejected in the absence of the said preferance afforded Noble Jones.

4/ It defies common practice for an employer to go to such extremes to promote an employee with such an employment history, if job qualification was the motivating factor, particularly where it had 16 certified white applicants.

Respectfully submitted,

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